NO. 19293

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT E. MORGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT AND STATEMENT OF THE CASE

On March 31, 1962, a six-count indictment was returned against appellant and one Maxmillian B. Michelson on charges of conspiracy to obtain payments from the United States by means of filing false and fictitious income tax returns, filing false claims in violation of 18 U.S.C. §287 and uttering a forged writing in violation of 18 U.S.C. §495 [C.T. 2-8]. 1/

Count one charged both appellant and Michelson with conspiracy; Counts two through five charged them with filing false,

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1/ "C.T." refers to Clerk's Transcript on Appeal.

fictitious and fraudulent claims for refunds; and Count six charged Michelson with uttering a writing containing forged endorsements.

Both appellants were arraigned on May 21, 1962 [Transcript of Proceedings of May 21, 1962], and subsequently entered pleas of not guilty to all counts.

Appellant filed numerous pretrial motions among which were a motion for a bill of particulars [C. T. 9], a petition to be released on bail [C. T. 153], a motion for "Production of Material for Inspection Prior to Trial" [C. T. 18], and in addition submitted to the Court an order to be signed by the Court allowing appellant certain privileges in connection with his preparation of the case, while confined in Los Angeles County Jail [S. S. C. T. 1]. 2/

All of the above motions were denied on September 24, 1962, with the exception of the request for jail privileges upon which the Court did not act [Minute Order of September 24, 1962].

On November 26, 1962, appellant appeared in court in propria persona, at which time, the Court urged him to accept the services of a court-appointed counsel [R. T. 11]. 3/

On December 3, 1962, co-defendant Michelson pleaded guilty to Counts four and six of the indictment and the case as to him was continued for sentencing to December 17, 1962 [R. T. 44].

Appellant's trial by a jury before the Honorable Harry C. Westover, United States District Judge, commenced upon December

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2/ "S. S. C. T. " refers to second supplemental Clerk's Transcript on appeal.

3/ "R. T. " refers to Reporter's Transcript.

4, 1962 [R. T. 58].

At the conclusion of the Government's case, the Court granted a motion for judgment of acquittal as to Counts one, two, and five of the indictment [R. T. 353, 355, 368]. The Court did permit the Government to re-open its case in chief for the purpose of proving that the returns were filed in the Southern District of California [R. T. 376].

On December 7, 1962, the jury returned a verdict on only one of the two counts, whereupon the Court instructed the jury to return to the jury room for deliberation until they had reached a verdict on the other count [R. T. 442-446]. The jury then returned a verdict of guilty on both counts three and four of the indictment [R. T. 448].

On January 28, 1963, appellant was sentenced to five years on each of Counts three and four to run consecutively to each other as well as to all other sentences, both State and federal [R. T. 485].

Appellant filed motions for new trials, which were denied [C. T. 112, 115]. A notice of appeal was timely filed [C. T. 144].

The jurisdiction of the District Court was predicated on Title 18, United States Code, Sections 287 and 3231. This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 18, United States Code, Section 287 provides:

"Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

III

STATEMENT OF FACTS

In December, 1959, appellant was an inmate at the Wayside Honor Ranch, a California state penal institution, where he was working as a trustee in the maximum security hospital [R.T. 187-188]. While he was working in the hospital, he met co-defendant Michelson, who was not an inmate, but was employed at the hospital as a registered surgical nurse [R.T. 186-187]. In the course of conversation, Michelson mentioned that he needed money [R.T. 209-210]. Appellant suggested to Michelson that there were numerous inmates who had tax refunds due to them, but who didn't want their wives to receive the checks. Appellant then stated that

he could fill out the returns and get them signed if Michelson could get addresses outside of the prison where the refund checks could be mailed [R. T. 211]. To this Michelson agreed, and he did obtain such addresses of other employees at the hospital as well as of a friend who operated a local service station [R. T. 211, 214]. These addresses were furnished appellant who stated that he didn't need to fill out inmates' returns, but that he just needed addresses, as he could use fictitious names [R. T. 217-218].

Thereafter, several such returns were filed in which the names did not correspond with the social security numbers and the employers were either fictitious or had no record of such person being employed [Exhibits 21, 22 and 23].

The signatures upon all these returns were in appellant's handwriting and the typing was from typewriters to which appellant had access [R. T. 62-63 and 237-261].

IV

SPECIFICATION OF ERRORS

Appellant has alleged that the trial court committed the following errors.

1. Appellant was not furnished a copy of the indictment until the day before trial.

2. The Court erred in denying certain of appellant's pretrial motions.

3. The trial judge refused to disqualify himself from

sitting.

4. The Court erred in denying appellant's motion for a mistrial.

5. The Court erred in admitting Exhibits 21, 22 and 23.

6. The verdict was contrary to the weight of the evidence.

7. The Court erred in certain statements to the jury.

8. The Court erred in admitting Exhibit 11.

9. The Court erred in allowing the Government to re-open its case.

10. The Court erred in denying appellant's motion for a new trial.

V

ARGUMENT

A. APPELLANT WAS GIVEN A COPY OF THE INDICTMENT AT THE TIME HE WAS ARRAIGNED.

Appellant claims that he never received a copy of the indictment until December 3, 1962, one day before trial is plainly dispelled by the record. Appellant first appeared for arraignment on May 21, 1962. At that time the Clerk handed to appellant, personally, a copy of the indictment. [Reporter's Transcript of proceedings of May 21, 1962 before the Honorable William M. Byrne, United States District Judge.]

B. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S PRE-TRIAL MOTIONS.

1. Motion for Bill of Particulars.

On May 3, 1962, almost three weeks before his arraignment, appellant filed a motion for a "Bill of Particulars and Copy of the Indictment". The motion for a Bill of Particulars was denied [R. T. 354].

The motion merely asks for a Bill of Particulars and does not make any specific requests for information which the government might have furnished.

The granting of a motion for a bill of particulars is within the sound discretion of the trial judge.

Wong Tai v. United States, 273 U.S. 77 (1927);

Yeargain v. United States, 314 F.2d 881 (9th Cir. 1963);

Cooper v. United States, 282 F.2d 527 (9th Cir. 1960).

The purposes of a bill of particulars are to protect defendant against a second prosecution for the same offense and to enable the defendant to prepare so as to avoid surprise at trial.

Cooper v. United States, supra.

However, a bill of particulars, is not to enable the defendant to know all of the evidence which the government will use to prove the charge.

Wong Tai v. United States, supra.

The indictment in this case outlined with particularity the false claim which appellant was accused of filing. No claim was ever made that he thought he was defending a different charge than the government proved. The evidence of which he complains was other similar acts [4/] which tended to prove appellant's intent in doing the acts charged.

At the time this evidence was admitted, over objection, appellant made no motions for a continuance which would give him the necessary time to prepare to answer this evidence or to subpoena witnesses who might establish that he did not file these two claims. A failure to do so has been found to negate an allegation of surprise, even where raised at trial.

Cooper v. United States, supra.

Moreover, appellant has never contended that he did not file the additional returns.

2. Motion for Production of Material for Inspection Prior to Trial.

On July 25, 1962, appellant filed a "Motion for Production of Material for Inspection Prior to Trial" [C. T. 18]. Such motion was made under Rule 17 of the Federal Rules of Criminal Procedure and Section 3500 of Title 18, United States Code,

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4/ The government offered two other returns filed by appellant, Exhibits 12 and 13.

commonly referred to as the Jencks Act. In his motion, appellant requested Grand Jury Transcripts, statements of himself or his co-defendant and statements of government witnesses.

In its opposition to this motion, the government stated it would make available any statement of the appellant but declined on the basis of the Jencks Act to provide any witnesses' statements prior to trial [C. T. 34].

Appellant now contends that under Rule 16 of the Federal Rules of Criminal Procedure he was entitled to matter other than that he requested in his motion. Even assuming that such a request was made, there is nothing in the record in this case to show that the government had anything obtained by seizure or process or anything taken from the appellant or belonging to him as is required by Rule 16.

3. Refusal to Release Appellant on Bond.

At the time the indictment in the case was returned, appellant was serving a state sentence in San Quentin.

In order to arraign appellant and to try him, it was necessary to have him present in court. On July 27, 1962, the District Court, on application of the United States Attorney issued a Writ of Habeas Corpus Ad Prosequendum, compelling the state authorities to produce appellant for "hearing on motions and all other proceedings incident thereto" [R. T. 26].

It is appellant's contention that once appellant was brought

from San Quentin pursuant to the writ, he was no longer in state custody, but rather was in federal custody on this charge and eligible for release on bond.

This contention is, however, dispelled by the very terms of the writ, itself, which provides in part: "and at the termination of the proceedings against said defendant to return him to custody of said Warden, Sheriff or Jailor" [C. T. 26]. Clearly the writ did not release appellant from custody but only permitted appellant to be prosecuted in federal court while serving a sentence in state custody.

Moreover, as the trial court pointed out in its order denying appellant's motion to be released, in addition to the state sentence, appellant was committed to the custody of the Attorney General for five years as a result of a federal prosecution in the Northern District of California [C. T. 160]. This, in itself, would prohibit his release, as there is no indication that appellant had posted bond in that case.

4. Failure of the Court to Sign Order For Certain Jail Privileges.

At the time of trial appellant was in state custody confined in Los Angeles County Jail. The order which he submitted to the Court was never acted upon by the Court.

Prior to trial and while confined at County Jail, appellant filed numerous motions containing code and case citations. The

Court offered to subpoena any witness appellant wished to have testify. Moreover, one week prior to trial, appellant filed a motion for an immediate trial, which was denied because government counsel was engaged in trial on another matter [C. T. 53]. The Court also urged him to accept a Court appointed counsel. Just prior to trial appellant submitted a typed motion to disqualify the trial judge and during trial he submitted typed requested jury instructions.

Where a defendant in custody has refused the assistance of counsel, it should not be incumbent upon the Court to compel the prison authorities to make provisions to assist appellant in the preparation of his case. The Court did offer to subpoena any witness requested by appellant.

C. THE COURT DID NOT ERR IN FAILING TO DISQUALIFY ITSELF FROM ACTING AS THE JUDGE AT APPELLANT'S TRIAL.

Prior to trial appellant filed a motion discharging the trial court judge from hearing the case. The thrust of the motion was based upon the Court's denial of numerous pretrial motions.

Disqualification of a District Court judge for prejudice is governed by Title 28, United States Code, Section 144, which provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a

personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

A judge's prior adverse rulings are not a sufficient basis for disqualifying him.

Deitle v. United States, 302 F. 2d 116 (7th Cir. 1962);

Freed v. Inland Empire Ins. Co., 174 F. Supp. 458 (D. C. Utah, 1959).

The motion itself failed to comply with the rules in that it failed to state that it was filed in good faith. As the Fifth Circuit stated in Beland v. United States, 117 Fed. 958 (5th Cir. 1941), at page 960:

"The courts have held that compliance with its every provision is essential * * * . The orderly administration of justice requires that affidavits filed under

the statute be strictly construed so as to prevent abuse, and that they state facts, not baseless conclusions, showing personal bias or prejudice of the judge against the affiant."

D. THE COURT DID NOT ERR IN FAILING TO GRANT APPELLANT'S MOTION FOR A MISTRIAL.

Appellant claims that because co-defendant Michelson pleaded guilty to only two out of six counts, Michelson should have been required to be tried upon the other four along with appellant.

Michelson pleaded guilty to two counts the day before trial and the case against him was then continued to a later date for sentencing. After appellant made the motion for a mistrial, Michelson testified for the government. In the middle of his testimony, after the Court had upheld Michelson's right not to testify to certain matters to which he did not plead guilty, the government dismissed all the remaining counts against him.

The power of the court to conduct separate trials for two defendants jointly charged in the same indictment is found in Rule 14 of the Federal Rules of Criminal Procedure.

E. THE TRIAL COURT DID NOT ERR IN ADMITTING EXHIBITS 21, 22 AND 23 OF THE GOVERNMENT.

These exhibits are statements of state and federal agencies showing the existence or non-existence of certain records. 5/

Appellant's sole contention is that the persons who made the search of the records should have been produced in court for cross-examination. The answer is twofold: (1) the presence of these persons is not necessary to lay a foundation for the documents, and (2) appellant could have brought them in as witnesses himself.

Rule 27 of the Federal Rules of Criminal Procedure provides as follows:

> "An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions."

Rule 44 of the Federal Rules of Civil Procedure provides in part:

5/ Exhibit 21 is a record of the California Department of Employment showing the non-existence of records for an employer listed on one of the returns.

Exhibit 22 is a record from the Department of Health, Education and Welfare showing that one of the Social Security numbers from one of the returns was non-existent and that another was for a different person than shown on the return.

Exhibit 23 is a record from the Navy Department showing that Robert E. Morgan was never employed by the Navy.

"(a) Authentication.

"(1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

* * *

"(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a) (1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a) (2) of this rule for a summary in the case

of a foreign record, is admissible as evidence that the records contain no such record or entry."

Appellant makes no contention that the Court failed to comply with these rules.

Moreover, prior to trial the Court offered to issue any subpoenaes which the appellant requested [R. T. 31]. Appellant did not request subpoenaes for any of the persons who conducted the record searches.

F. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION.

Appellant's argument in this specification of argument is essentially that since the exhibits which prove that the claims were false were not inadmissible, and since the persons in whose names the returns were filed were not called, the evidence is insufficient. It has already been shown that the evidence objected to was admissible in the preceding argument. This evidence alone establishes the falsity of the claims, for it shows that no persons with the names and social security numbers used existed and that no such employers were in existence in the State of California. Since there was no such person and no such employers, there was no one whom the government could call to say that he does not exist.

Furthermore, the testimony of co-defendant Michelson

establishes that appellant told Michelson that they could file fictitious returns [R. T. 218].

G. THE COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY.

Appellant cites as error two statements made by the trial judge to the jury. The first alleged error relates to the Court's statement when it advised the jury that the Court had acquitted appellant on two counts and that the jury should not acquit appellant on the remaining counts for the reason that the Court had acquitted him on other counts. The second alleged error is that the trial judge forced a guilty verdict when, after the jury had returned a verdict on one count, leaving the other blank, he sent them back to the jury room for a verdict on the other count.

In both instances, these complaints arise for the first time on appeal. 6/ Appellant, who throughout the trial, exhibited no reluctance to offer objection where he thought appropriate, failed

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6/ "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party shall assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." Rule 30, Federal Rules of Criminal Procedure.

to inform the Court, at the time when any possible misstatements could have been corrected, that there was a need to do so.

Reading all of the Court's instructions together, as the jury was instructed, 7/ there is nothing in either of the instructions of which appellant complains, that even suggests that the presumption of innocence or the burden of proof beyond a reasonable doubt were not applicable.

H. THE COURT DID NOT ERR BY ADMITTING EXHIBIT #11.

Exhibit #11 is a photostatic copy of a short form income tax return, the original of which the government was unable to locate [R.T. 159].

An employee of the Internal Revenue Service testified that in the ordinary course of his duties he made a copy of the return, compared the two, and they were similar [R.T. 316].

Rule 27 of the Federal Rules of Criminal Procedure states:

> "An official record . . . may be proved in the same manner as in civil actions."

Title 28 of the United States Code, Section 1732(b) reads in part:

> "If . . . any department or agency of Government

7/ R.T. 421.

in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, . . . or other process which accurately reproduces or forms a durable medium for so reproducing the original. . . . Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial . . . proceeding whether the original is in existence or not. . . . "

I. THE COURT DID NOT ERR IN PERMITTING THE GOVERNMENT TO RE-OPEN ITS CASE AFTER THE MOTION FOR JUDGMENT OF ACQUITTAL HAD BEEN MADE.

It is within the sound discretion of the court to permit the government to re-open its case, after it has rested, for the purpose of offering additional evidence, even where such evidence constitutes a material element of the crime, without which there could be no conviction.

Haugen v. United States, 153 F. 2d 850 (9th Cir. 1946);

United States v. Williams, 336 F. 2d 183

(2nd Cir. 1964).

In the Haugen case, supra, after all parties had rested in a court trial, the court ruled that certain evidence was inadmissible, and stated that the result was the failure of the government to prove a material element of the offense. Five days later, the government moved to re-open its case to prove this element by other evidence. The court permitted this and convicted the defendant. This Court, in affirming the conviction, held that since there had been no acquittal, as yet, the trial court could allow the government to re-open.

J. THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

A motion for new trial is addressed to the sound discretion of the trial judge and should not be disturbed in the absence of an abuse thereof.

Straight v. United States, 263 F. 2d 811

(9th Cir. 1959).

As heretofore shown, appellant has failed to establish that the trial court abused its discretion in denying the motion.

Appellant's grounds for claiming that the court erred in denying the motion for a new trial are the same as those already discussed. For that reason, they will not be discussed again in connection with this point.

VI

CONCLUSION

For the reasons herein stated, the conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Arthur I. Berman

ARTHUR I. BERMAN
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